In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1944

No. 783

LOUIS FLEISH,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz Island, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

	Page
Petition for writ of certiorari	1
Statement of matter involved	2
Jurisdictional statement	4
Questions presented	5
Reasons relied upon for allowance of writ	5
Prayer for writ	10
Brief in support of petition for writ of certiorari	11
Opinion of court below	11
Jurisdictional statement	12
Statement of matter involved	12
Specification of errors	12
Argument	13
Summary	13
1. The offenses charged in counts 3, 12, 15, 18 and 21 constituted one indivisible offense	13
2. The offenses charged in counts 1 and 3 constituted one indivisible offense	18
Conclusion	26

Appendix:

26 U.S.C.A. 1132b	i
26 U.S.C.A. 1132c	ii
26 U.S.C.A. 1132d	iii
26 U.S.C.A. 1132e	iv
26 U.S.C.A. 1132m	iv

Table of Authorities Cited

Cases

	Pages
Bertsch v. Snook, 36 F. (2d) 155	3
Braden v. United States, 270 F. 441	5, 14, 17
Burton v. United States, 202 U.S. 344, 50 L. Ed. 1057	7, 8, 18, 26
Caballero v. Hudspeth, 114 F. (2d) 545	9, 23, 24
Colson v. Johnston, 35 Fed. Supp. 317	16
Crapo v. United States, 100 F. (2d) 996	8, 21
Dimenza v. Johnston, 130 F. (2d) 465	9, 24, 25
Ebeling v. Morgan, 237 U.S. 625, 59 L. Ed. 1151	17
Ex parte Lagomarsino, 13 Fed. Supp. 947	14, 15
Faraone v. United States, 259 F. 507	21
Gavieres v. United States, 220 U.S. 338, 55 L. Ed. 489	7, 8, 18
Gee Woe v. United States, 250 F. 428	20
Giacolone v. United States, 13 F. (2d) 108	21
Goodfriend v. United States, 294 F. 148	21
Harlan v. McGourin, 218 U.S. 442, 54 L. Ed. 1101	3
Johnston v. Lagomarsino, 88 F. (2d) 86	6, 14, 15, 17
Lewis v. United States, 4 F. (2d) 520	8, 22
Martinez v. United States, 25 F. (2d) 303	21
McCurry v. United States, 281 F. 532	21
McKee v. Johnston, 109 F. (2d) 273	17
Montague v. United States, 294 F. 277	21
Morgan v. Devine, 237 U.S. 632, 59 L. Ed. 1153	7, 8, 18
Parmagini v. United States, 42 F. (2d) 721	5, 14, 15, 17
Roark v. United States, 17 F. (2d) 570	8, 14, 23
Robinson v. United States, 143 F. (2d) 276	6, 16, 17
Rossi v. United States, 289 U.S. 89, 77 L. Ed. 1051	7, 19, 21, 22
Sauvain v. United States, 31 F. (2d) 732	21
Sonzinsky v. United States, 300 U.S. 506, 81 L. Ed. 772	6
Taylor v. United States, 19 F. (2d) 813	21
United States v. Miller, 307 U.S. 174, 83 L. Ed. 207	6

Codes

	Pages
18 U.S.C.A. 641	3
26 U.S.C.A. 1132d	2
26 U.S.C.A. 2700-2733, 1940 Edition	6
28 U.S.C.A. 347(a)	4
28 U.S.C.A. 350	5
28 U.S.C.A. 451	2
28 U.S.C.A. 452	2
28 U.S.C.A. 463	4
26 U.S.C.A. 1132-1132q, 1934 Edition	2, 5, 6, 9, 10, 12, 13, 18, 19, 21

Miscellaneous

Corpus Juris Secundum, Criminal Law, section 279	18
Federal Rules of Civil Procedure:	
Rule 73	4
Rule 81	4
Rule 38 of the Supreme Court of the United States	5

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PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Louis Fleish, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF MATTER INVOLVED.

Petitioner was charged, by an indictment (R. 5-8) filed on June 2, 1938 in the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called "Trial Court", with violations of 26 U.S.C.A. 1132d and 1132e (1934 Edition), set forth verbatim in the Appendix, being portions of the National Firearms Act. Count 1 (R. 5) of the indictment, based upon 26 U.S.C.A. 1132e, charged that petitioner, at a certain time and place, received and possessed a firearm upon which the transfer tax had not been paid. Count 3 (R. 6), based upon 26 U.S.C.A. 1132d, charged that petitioner, at the same time and place, possessed the same firearm without registering it. Counts 12, 15, 18 and 21 (R. 6-8), also based upon 26 U.S.C.A. 1132d, were identical with Count 3, except that a different firearm was described in each. Upon a verdict of guilty upon the aforesaid six Counts, petitioner was sentenced on April 7, 1939 (R. 2) to be imprisoned for a term of five years upon each of said Counts, said terms to run consecutively, and to pay a fine of $2000.00 (R. 3).

Upon June 24, 1943, petitioner filed with the District Court of the United States for the Northern District of California, Southern Division, his verified petition for a writ of habeas corpus (R. 2-3), pursuant to the provisions of 28 U.S.C.A. 451 (conferring powers on the Federal District Courts to issue writs of habeas corpus) and of 28 U.S.C.A. 452 (conferring powers on the several judges of the said District Courts to grant said writs for the purpose of inquiring into the cause of restraint of liberty), alleging that he was unlawfully restrained of his liberty by

imprisonment in the United States Penitentiary at Alcatraz Island, California, under the custody of respondent. The said petition further alleged that the said restraint was illegal for the reason that it was contrary to that portion of the Fifth Amendment to the Constitution of the United States which provided that no person should be subject to be twice put in jeopardy for the same offense, in that Counts 1, 3, 12, 15, 18 and 21 purported to charge separate offenses and in that the said Trial Court rendered separate, consecutive sentences thereon, whereas said counts, as a matter of law, charged but one offense; that the maximum penalty which the said Trial Court lawfully could have imposed for the single offense was imprisonment for a single term of five years and a fine of $2000.00; that the sentence of imprisonment was void to the extent that it exceeded the term of five years (Counts 3, 12, 15, 18 and 21) and that petitioner had served the authorized portion of his sentence of imprisonment (Count 1). The said petition was based upon the general principle that relief may be had by habeas corpus when the sentence imposes imprisonment for a longer term than that authorized by law and petitioner has served the authorized part (*Harlan v. McGourin,* 218 U.S. 442, 54 L. Ed. 1101; *Bertsch v. Snook,* 36 F. (2d) 155).

Petitioner applied to the United States Commissioner in San Francisco, California, on July 16, 1943, to discharge his liability for the payment of said fine, in accordance with the provisions of 18 U.S.C.A. 641 (R. 3). The said application was denied on July 21, 1943 (R. 3).

Thereafter, the said petition for a writ of habeas corpus was, on return to order to show cause, heard by and argued before the said District Court and was, on September 21, 1943, denied by the said District Court (R. 4 and 8).

Petitioner, on December 20, 1943, invoked the appellate jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, hereinafter called "Appellate Court", by the timely filing of his notice of appeal (R. 8), under the procedure established by Rule 73 of the Federal Rules of Civil Procedure and rendered applicable to appeals in habeas corpus proceedings by Rule 81 of said Rules. The Appellate Court had jurisdiction of the said appeal under the provisions of 28 U.S.C.A. 463 (providing that, in a proceeding in habeas corpus in a Federal District Court, the final order should be subject to review on appeal by the Circuit Court of Appeals of the circuit wherein the proceedings were had). Upon September 29, 1944, the Appellate Court rendered its decree (R. 16) affirming the order of the said District Court, and the said decree was entered on the same day. The opinion of the Appellate Court is reported in 145 F. (2d) 16, and is also printed in full in the record (R. 13-16).

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under the provisions of Section 240(a), as amended, of the Judicial Code (28 U.S.C.A. 347(a)).

The decree of the Appellate Court was entered on September 29, 1944 (R. 16), and this petition for a

writ of certiorari to review same is filed within the three months' period permitted by 28 U.S.C.A. 350 and Rule 38 of this Court.

QUESTIONS PRESENTED.

I. Did the Appellate Court, in its construction of 26 U.S.C.A. 1132d and 1132e, err in holding, as a matter of law, that the Trial Court had power to sentence petitioner separately upon Counts 3, 12, 15, 18 and 21 of the indictment after it had sentenced him upon Count 1 thereof?

II. Did the Appellate Court err in finding (by inference), as a matter of fact, that the petitioner had not served his sentence under Count 1 of the indictment?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The decision of the Appellate Court, in holding that the possession of five different firearms (Counts 3, 12, 15, 18 and 21) at the same time and place constituted five separate offenses (and permitting the imposition of a sentence of imprisonment of twenty-five years),

1. Is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Braden v. United States,* 270 F. 441 (1920), where the possession of four different drugs at the same time and place was held to be one offense only;

2. Is in conflict with its own decisions in the case of *Parmagini v. United States,* 42 F. (2d) 721 (1930), where the concealing of two different

drugs at the same time and place was held to be one offense, and in the case of *Johnston v. Lagomarsino,* 88 F. (2d) 86 (1937), where the taking of three different parcels of mail matter at the same time and place was held to be but a single offense;

3. Is in conflict with the recent decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Robinson v. United States,* 143 F. (2d) 276 (1944), where the transportation of three different women at the same time and place was held to constitute only one offense;

4. Involves an important question of federal law which has not been, but should be, settled by this Court. From 1934 to 1939, the National Firearms Act (26 U.S.C.A. 1132-1132q, 1934 Edition) constituted the federal law governing the use of firearms in the United States; in 1939, substantially all of the provisions of the said Act were carried forward into the Internal Revenue Code (26 U.S.C.A. 2700-2733, 1940 Edition), and this Code today contains the controlling federal statutes on the subject. The only two instances in which this Court has passed upon this federal legislation, in the ten years of the latter's existence, dealt with the question of constitutionality (*Sonzinsky v. United States,* 300 U.S. 506, 81 L. Ed. 772, 1937; *United States v. Miller,* 307 U.S. 174, 83 L. Ed. 207, 1939). This Court has never determined, under 26 U.S.C.A. 1132d (Counts 3, 12, 15, 18 and 21), whether or not an individual possessing, at the same time and place, a hundred firearms which had not been registered could be

sentenced to imprisonment for an aggregate term of five hundred years. This is a matter which will become of increasing importance in post-war years, at a time when countless firearms in the United States will be possessed by individuals returning from combat and by other law-abiding citizens ignorant of the minute requirements of federal law. In the public interests of fairness to such persons and of minimizing criminal litigation, this Court should settle, for the first and last time, the question herein raised.

The decision of the Appellate Court, in holding that the receipt and possession of a firearm which had been transferred without payment of tax (Count 1) and the possession of the same firearm at the same time and place without registration (Count 3) constituted two separate offenses,

1. Is the decision of a federal question in a way probably in conflict with applicable decisions of this Court. In *Burton v. United States,* 202 U.S. 344, 50 L. Ed. 1057 (1906), in *Gavieres v. United States,* 220 U.S. 338, 55 L. Ed. 489 (1911), and in *Morgan v. Devine,* 237 U.S. 632, 59 L. Ed. 1153 (1915), this Court relied upon the "same-evidence" test in determining the identity of offenses, which said test in substance provides that, if the same evidence will sustain a conviction on each count, the counts allege but one offense; the Appellate Court failed to apply this test. In *Rossi v. United States,* 289 U.S. 89, 77 L. Ed. 1051, the principle was laid down that negative averments need not be proved; the Appellate Court failed to apply this principle. It was only neces-

sary for the prosecution in the instant case to prove petitioner's receipt and possession of the single firearm in order to convict him upon Counts 1 and 3; therefore, the same evidence which was required to prove Count 1 also proved Count 3; under such circumstances, there was only one offense;

2. Is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Crapo v. United States,* 100 F. (2d) 996 (1939), where it was held that, in order to convict for the possesion of a firearm which had been transferred without a written order, the prosecution need prove only the possession, on the ground that a negative averment did not require proof; if this is so, petitioner could have been convicted upon both Counts 1 and 3 upon proof of the receipt and possession of the single firearm, and therefore there was only one offense (*Burton v. United States,* supra; *Gavieres v. United States,* supra; *Morgan v. Devine,* supra);

3. Is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Lewis v. United States,* 4 F. (2d) 520 (1925), where it was held that the possession of liquor with intent to sell it without a permit and the possession of the same liquor at the same time and place with intent to transport it without a permit constituted only one offense;

4. Is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Roark v. United States,* 17 F. (2d) 570 (1927), where it was held that the causing of a

woman to be transported for the purpose of having illicit intercourse and the causing, at the same time, of the same woman to be transported for the purpose of prostitution constituted a single offense;

5. Is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Caballero v. Hudspeth,* 114 F. (2d) 545 (1940), where it was held that the transportation of a woman with intent to compel her to engage in prostitution and, at the same time and place, the transportation of the same woman with intent to cohabit unlawfully with her were one offense;

6. Is in conflict with its own decision in the case of *Dimenza v. Johnston,* 130 F. (2d) 465 (1942), where it was held that the robbing of a bank, during the course of which the lives of three different persons were jeopardized, was but a single offense;

7. Involves an important question of federal law which has not been, but should be, settled by this Court. Reference has heretofore been made to the nature of the statute and the increasing importance in post-war years of its clarification. This Court has never determined, under 26 U.S.C.A. 1132e (Counts 1 and 3), whether or not an individual in possession of a single firearm could be sentenced to imprisonment for an aggregate term of twenty years because the one possession was illegal by reason of an earlier transfer with reference to which (a) the transfer tax had not been paid (26 U.S.C.A. 1132b(a)), (b) the stamps had not been affixed to the order for the firearm

(26 U.S.C.A. 1132b(a), (c) no written order from the transferee had been obtained (26 U.S.C.A. 1132c(a)), and the stamp-affixed order had not been transferred (26 U.S.C.A. 1132c(d)).

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10,672, Louis Fleish, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz Island, California, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the decree herein of the said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, San Francisco, California,
December 20, 1944.

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JOHN BENNETT KING,
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